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Supreme Court, U.S.
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No. 08-

IN THE

Supreme Court of the United States

TEJPAL SINGH,

Petitioner,

v.

THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Should the Supreme Court establish a uniform standard, consistent with either due process or the right to present a defense, by which a prosecutor may be required, or ordered, to grant immunity to a crucial defense witness?

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Petitioner Tejpal Singh respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, in this case.

JURISDICTION AND OPINIONS BELOW

The judgment and opinion of the Appellate Division, Second Judicial Department, was entered on January 15, 2008 (Appendix A), and is reported at 47 A.D.3d 733, 849 N.Y.S.2d 606 (2nd Dept. 2008). The New York State Court of Appeals (Pigott, J.) denied a timely application for leave to appeal to that Court, in a certificate dated May 13, 2008, which is reported at 10 N.Y.3d 870, __ N.Y.S.2d __, 2008 WL 2663003 (2008) (Appendix B).

The Supreme Court has jurisdiction to entertain this petition for a writ of certiorari pursuant to 28 U.S.C. § 1257(a), as well as Rules 10(c) and 13 of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, **Amendment V**, provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property without due process of law . . .

United States Constitution, **Amendment VI**, provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . .

United States Constitution, **Amendment XIV**, provides in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

A. The Charges

Queens County Indictment no. 2733/00 theorized that on August 25, 1996, Petitioner, accompanied by others, alone fired a .45 caliber automatic weapon from a passing black Chevrolet Blazer SUV, in front of 123-16 97th Avenue in the Richmond Hill section of Queens in New York City. Petitioner was charged with the consequent murder of one Kamaljit (Goldy) Singh, as well as the assault and wounding of Ramjit (Rocky) Singh, both members of a rival group in the Borough's Sikh community.

B. The People's Evidence

The People presented two eyewitnesses, including Rocky, who identified four of the occupants of the vehicle and testified that Petitioner had been sitting in the front passenger seat. They asserted to the jury that Petitioner had been the actual shooter who fired the weapon out of the window.

The prosecution further proved that five discharged .45 caliber automatic shells were found on the street at the scene of the shooting, in front of the residence from

which the victims and others had exited just moments earlier. The shells spanned a distance of 29 feet. Also recovered from inside the residence was a deformed .38 caliber bullet, which came inward from outside the residence, and a light colored T-shirt with a bullet hole and blood. Although the authorities sent the T-shirt to the laboratory, they presented no evidence concerning whose blood was contained on the shirt. It was undisputed, however, that no one had been in the residence at the time of the street side shootings.

One gun fired all five .45 caliber shell casings. The deformed bullet found inside the residence was a .38 caliber and was not consistent with the .45 caliber shell casings found on the street. Consequently, the same gun could not account for both the shell casings on the street and the deformed bullet found inside the residence. A .45 caliber bullet recovered from the medical examiner's office was consistent with the shell casings recovered from the scene.

On September 6, 2000, almost four years after the shootings, New York detectives met with officials of the Royal Canadian Mounted Police in Summerland, British Columbia. Using binoculars, the officers observed Petitioner on a farm riding a tractor. Unlike his appearance at trial, Petitioner was wearing a full beard, moustache and turban. When the detectives approached, Petitioner indicated that his name was other than his own.

C. The Defense Proffers

Petitioner, who has continually protested his innocence, maintained that he had been either purposely or negligently misidentified. In furtherance of that effort, Petitioner sought to introduce various items of evidence which, according to his proffer, would demonstrate that he had not been an occupant of the passing vehicle.

In furtherance of the defense of innocence, counsel offered declarations against penal interest based on interviews of four persons, gathered by a defense investigator from different parts of the globe. Each of the persons interviewed admitted to having been a passenger in the car. Thus, in addition to statements elicited from one "Jassa," whom Peoples' witnesses already identified as an occupant of the car, the defense sought to admit further statements from other individuals named "Anu," "Lali" and "Vicki," most of whom were either maintaining or at least suggesting that Anu, not the absent Petitioner, had been the actual shooter.

According to the proffers, each of these persons — who placed themselves in the Black SUV with knowledge that they were going to attack Rocky — had been separately interviewed by a defense investigator in such distant places as Ontario, Georgia, Texas and India, where they had fled following the shootings. *The District Attorney refused to act on this information after the defense had given it to the prosecutors.*

Citing witness intimidation, defense counsel added that a retired detective — one James Carroll, a former supervisor of the police department's investigative team in this case — recommended Anu's arrest after interviewing him in Atlanta, Georgia, where Anu had fled following the shootings. Defense counsel noted that the police department informed Carroll that the assistant district attorney had expressed an intention to arrest him if he showed up in court. Counsel added that, until then, Carroll was ready and willing to appear.[1]

The trial judge refused to admit any of the proposed evidence. In his view, the requisite foundation for declarations against penal interest as to each individual were not established.

D. The Request to Have Anu Immunized

An alternative application to have the District Attorney confer immunity upon Anu, who invoked the Fifth Amendment when "diligently" produced as a material witness from Atlanta, was declined. In furtherance of the defense's application to grant immunity to Anu, who had been willing to testify

1. The prosecutor rejoined that she had not personally spoken to Carroll since his retirement from the police department, in or about January 2004. Moreover, she claimed to have told counsel that if Carroll wanted to appear in court, he ought to bring a lawyer since he retired on "modified" because the department had "put him on administrative charges" as a result of a corruption investigation by the District Attorney involving an officer who worked with Carroll at the 102nd Precinct. There is no indication that, in the absence of his testimony, any charge had ever been, nor would ever be, brought against Carroll.

originally but then indicated his refusal to do so, defense counsel urged that since the People "don't believe he's the shooter or did anything wrong, I would ask that they give him immunity so his Fifth Amendment would not have any place in this court."

According to defense counsel's specific proffer, Anu, while excluding Petitioner as an occupant of the vehicle, would state that

> he was at the party before [the shooting] occurred, that he saw Jassa and another individual with a gun, that he saw the five people leave in the black jeep and that then after the shooting they came back and had some conversation, made some statements about what happened and saw some shell casings.

The issue was revisited following Anu's actual invocation of the Fifth Amendment upon his appearance pursuant to a material witness order served in Georgia. In the face of the District Attorney's adamant refusal, counsel noted that the prosecutor's declination to grant immunity was "preventing my client from receiving a fair trial. I think certainly, in terms of due process of law, it prevents him from receiving that due process of law." Counsel then reminded the court that the People

> dismissed, I understand, the charges against Jinder [*i.e.*, another occupant of the car], even when they went to the Grand Jury. There was no indictment, as I understand, and that was as a result of the prosecution dismissing the

> case. So, if there is going to be some consistency and some parity, there's no basis not to give him immunity under these circumstances.

Reacting to this contention, the assistant district attorney adopted a new line of argument, stating for first time — despite her earlier refusal to authorize Det. Carroll's request to arrest Anu — that bullets of at least two different calibers had been recovered around the crime scene, thereby suggesting a second shooter had been present. Counsel replied strenuously, however, that the prosecutors

> knew, with all due respect, at the time they arrested and they dismissed the charges against Jinder [and, likewise, at the time when they earlier declined to have Anu arrested], that there were two guns. The prosecution isn't going to suggest that they learned that for the first time when they went to trial here?

Responding to the court's denial of the application, counsel moved for a mistrial, which the court also denied. Alternatively, counsel then renewed his earlier application to admit Anu's statement as a declaration against his penal interest. Upon the court's denial of that application as well, counsel stated that such repeated adverse rulings forced the defense to rest.

E. The Sentencing

Following his conviction by the jury in the absence of any defense witnesses, Petitioner Tejpal Singh appeared for sentencing on December 14, 2004, and strenuously maintained his innocence. Unmoved, the court imposed concurrent terms of imprisonment totaling 25 years to life.[2]

F. The New York Appeals

In his appeal to the Appellate Division, Second Judicial Department, Petitioner argued, *inter alia*, that the prosecutor abused her discretion, in violation of his federal and New York constitutional rights to due process and to present a defense, by denying his request

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2. Approximately ten months after his sentencing, Petitioner filed a collateral motion to vacate judgment pursuant to New York Criminal Procedure Law CPL § 440.10(1) (the sole cause for the long delay in the perfection of his state appeals). In addition to the availability of a newly discovered witness (who, having recognized the occupants of the passing vehicle, affirmatively removed Petitioner therefrom), as well as the later admitted perjury of one of the witnesses who identified Petitioner at trial, it was therein alleged, *inter alia*, that the rival group of Sikhs had unsuccessfully sought to pressure an individual to implicate Petitioner, in order to undermine the authority of Petitioner's father, who was the leader of Petitioner's own group. Although the witness's testimony was unscathed at the evidentiary hearing, the motion was ultimately denied by the trial judge. Leave to appeal was denied by an Appellate Division Justice, pursuant to New York Criminal Procedure Law § 450.15 (1), as was Petitioner's additional motion that the requested appeal be consolidated with the pending appeal from the judgment of conviction.

to immunize Anu Singh. Rejecting this contention, the Appellate Division tersely held, absent any explanation, that "[t]he defendant's contention that the prosecutor abused her discretion by denying immunity to a defense witness is without merit (*see* CPL 50.30; *People v. Chin*, 67 N.Y.2d 22, 32, 499 N.Y.S.2d 638 [1986]; *People v. Williams*, 169 A.D.2d 798, 566 N.Y.S.2d 520 [2nd Dept. 1991])." Appendix A.

Leave to appeal to the New York Court of Appeals was thereafter denied by Associate Judge Eugene Pigott in a certificate dated May 13, 2008. Appendix B.

REASONS FOR GRANTING THE PETITION

The Supreme Court Should Determine Whether, Consistent with either the Right to Due Process or the Right to Present a Defense, There Should be a Uniform Standard By Which a prosecutor May be Required, or ordered, to Grant Immunity to a Proposed Defense Witness

The instant petition raises "an important question of federal law that has not been, but should be, settled by this Court." Supreme Court Rule 10(c). Specifically, to this day, the "Supreme Court has not decided whether courts have inherent authority, derived from Petitioner's due process right to present a defense, to grant non-statutory immunity to defense witnesses, and the circuit courts that have addressed the issue have produced divergent opinions." *See Autrey v. McKaskle*, 465 U.S. 1085, 1088 n. 3 (1984) (Marshall, J., dissenting)." *United States v. Skilling*, 2006 WL 1737546, at *2 (S.D. Tex. June 23, 2006); *Ko v. Burge*, 2008 W.L. 552629 at

*15 (S.D.N.Y. Feb. 26, 2008). Nor, despite alluding to it, has the Court ever addressed a prosecutor's own responsibility to safeguard a defendant's Sixth Amendment rights where there is no legitimate reason to deny immunity to a defense witness who invokes the right against self-incrimination.

The resulting conflict among the various Circuit Courts of Appeals and state courts remains intact, notwithstanding that, as far back as 24 years ago, Justice Marshal complained that "the proper standards for testing such claims," *Autrey v. McKaskle*, 465 U.S. at 1086 (Marshall, J., dissenting), needed to be addressed. Indeed, the Court has since declined several more opportunities to address and thereby resolve this conflict. *See e.g. Hunter v. California*, 498 U.S. 887 (1990) (Marshall, J., dissenting); *Ebbers v. United States*, 127 S. Ct. 1483 (2007); *Ko v. New York*, 546 U.S. 1093 (2006).

A. Due Process and the Right to Present a Defense

This Court has repeatedly stated that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense. *E.g.*, *Webb v. Texas*, 409 U.S. 95 (1972); *Washington v. Texas*, 388 U.S. 14, 19 (1967); *In re Oliver*, 333 U.S. 257 (1948)." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). *See also Taylor v. Illinois*, 484 U.S. 400, 408 (1988); *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987).

Indeed, in *Webb v. Texas*, recalling its earlier pronouncement in *Washington v. Texas*, 388 U.S. at 19, the Court noted:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the Petitioner's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

409 U.S. at 98; internal quotes omitted.

Later, in the oft-cited case of *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), the Court emphasized that

> [w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi, supra*, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington v. Texas*, 388 U.S. 14, 23 (1967); *Davis v. Alaska*, 415 U.S. 308 (1974), the Constitution guarantees criminal Petitioners "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. [479, at 485 [1984]; *cf. Strickland v. Washington*, 466 U.S. 668, 684-685 (1984) ("The Constitution

> guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment"). We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. *In re Oliver*, 333 U.S. 257, 273 (1948); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

The following year, in *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987), another abundantly cited decision, this Court, in furtherance of an analysis involving "some of the specific rights secured by the [compulsory process] part of the Sixth Amendment[,]" emphasized the burden on prosecutors as well. It thus enunciated the parallel proposition that,

> [o]ur cases establish, at a minimum, that criminal Petitioners have the right to *the government's assistance in compelling the attendance of favorable witnesses at trial* and the right to put before a jury evidence that might influence the determination of guilt.

Emphasis added. Neither *Ritchie* nor *Taylor*, 484 U.S. at 408, explained what such "government's assistance" should entail.

To be sure, in *Montana v. Egelhoff*, 518 U.S. 37, 53 (1996), the Court would later emphasize that *Crane* had not announced an absolute proposition. Rather, the Court stated, "*Crane* does nothing to undermine the principle that the introduction of relevant evidence can

be limited by the State for a 'valid' reason, as it has been by Montana." In *Egelhoff*, therefore, the Court upheld a statutory provision which precluded a jury from considering evidence of voluntary intoxication, as not undermining any "fundamental principle of justice." According to the majority, *Crane* did not preclude such a rule since a "valid state justification existed." 518 U.S. at 53.

In stark contrast, and more in line with *Crane*, is the recent decision in *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727 (2006). There, the Court reversed a conviction upon finding no valid basis for South Carolina's evidentiary rule which precluded Petitioners from introducing evidence of third party guilt in the face of prosecutorial forensic evidence. Recapitulating these long-held principles, the Court stated:

> "[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *United States v. Scheffer*, 523 U.S. 303, 308 (1998); *see also Crane v. Kentucky*, 476 U.S. 683, 689-690 (1986); *Marshall v. Lonberger*, 459 U.S. 422, 438, n. 6 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 302-303 (1973); *Spencer v. Texas*, 385 U.S. 554, 564 (1967). This latitude, however, has limits. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the *Constitution guarantees criminal Petitioners 'a meaningful opportunity to present a complete defense.'*"

> *Crane, supra,* at 690 (quoting *California v. Trombetta,* 467 U.S. 479, 485 [1984]; citations omitted). This right is abridged by evidence rules that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Scheffer, supra,* at 308 (quoting *Rock v. Arkansas,* 483 U.S. 44, 58, 56 [1987]).

547 U.S. at 324-25, 126 S. Ct. at 1731; emphasis added.

B. The Irreconcilably Conflicting Standards as To Whether The Right to Present a Defense Includes the Right To Have a Crucial Witness Immunized

Part of this Sixth Amendment right to present a defense, of course, is the ability of an accused to call witnesses whose testimony is "material and favorable to his defense." *United States v. Valenzuela-Bernal,* 458 U.S. 858, 867 (1982). Yet, as would be demonstrated in this case on plenary review, were certiorari to be granted, that ability can be severely hampered when a prosecutor, absent any obligation to demonstrate a rationale for her decision, refuses, *ipse dixit,* to grant immunity to a person whom the defense has demonstrated is central to a viable defense, *yet whom the prosecutor specifically declined to charge.*

It is respectfully urged that the Court should grant this petition and thereby determine whether the exercise of such arbitrary prosecutorial power is limited. The Court should determine those circumstances under which such refusal can amount to an abuse of discretion,

and, in that event, when a trial court can inject itself into the issue. Rather surprisingly, not since Justice Marshall's 18 year old comments in *Hunter v. California*, 498 U.S. at 887 (Marshall, J., dissenting), citing his 24 year old dissent in *Autrey v. McKaskle*, *supra*, 465 U.S. at 1088 n. 3 (Marshall, J., dissenting), has any member of the Court even noted the issue. *Ko v. Burge*, *supra*. Yet, if the clause in *Pennsylvania v. Ritchie*, *supra*, 480 U.S. at 56 and *Taylor v. Louisiana*, 484 U.S. at 408 (*i.e.* "criminal Petitioners have the right to the government's assistance in compelling the attendance of favorable witnesses at trial") is to have any meaning, it might very well be held to apply, upon plenary review, to the context of the issue presented in this petition.

Instead, owing to the Supreme Court's earlier declination to address this question, the reality is that jurisprudential bedlam has ensued. Indeed, the various Circuit Courts of Appeals, and certainly the New York Court of Appeals, have eschewed even a modicum of uniformity toward creating some pragmatic and objectively cognizable standard under which to determine the propriety of a prosecutorial refusal to grant defense witness immunity. The situation, therefore, has not at all improved from what Justice Marshall recognized 24 years ago in *Autrey v. McKaskle*:

> As the Fifth Circuit has noted: "The Supreme Court has not decided whether courts may grant defense witnesses use immunity, and the circuit courts which have addressed the issue have produced widely divergent opinions. On the question whether judicial use immunity is

> necessary for essential exculpatory testimony, the courts have split three ways. The Third Circuit . . . held that such immunity is available in certain circumstances. On the other hand, the Seventh, Eighth, and District of Columbia Circuits have ruled that such immunity is unavailable . . . The remaining circuits which have addressed the issue have denied immunity in the specific cases before them, but left open whether immunity would ever be available." *United States v. Thevis*, 665 F.2d 616, 639 (1982) (citations omitted). Although the Fifth Circuit has never explicitly determined whether due process may require a trial court to grant a defendant use immunity, its decisions imply that courts lack such power under any circumstances. *Id.*, at 639, n. 25.

465 U.S. at 1088, n. 3 (Marshal, J., dissenting).

In the end, we are left with no standardizing authority from this Court, thereby fostering the lingering result – as Petitioner would urge, if granted plenary review – that an *ipse dixit* prosecutorial refusal to grant immunity to a contemplated defense witness can well deprive a criminal defendant, who may have no other place to turn in order to produce exculpatory witnesses, of fundamental fairness and the Sixth Amendment right to present a defense.

Specifically, as far as **New York** is concerned, in *People v. Chin*, 67 N.Y.2d 22, 32, 499 N.Y.S.2d 638, 646 (1986), the Court of Appeals noted:

> [T]he prosecutor's discretion to confer immunity on witnesses called by Petitioners is quite broad (New York CPL §50.30 [McKinneys 2003]; *People v. Owens*, 63 N.Y.2d 824, 482 N.Y.S.2d 250 [1984]; *People v. Adams*, 53 N.Y.2d 241, 247, 440 N.Y.S.2d 902 [1981]; *People v. Shapiro*, 50 N.Y.2d 747,431 N.Y.S.2d 422 [1980]; *People v. Sapia*, 41 N.Y.2d 160, 391 N.Y.S.2d 93 [1976], *cert. denied* 434 U.S. 823). That discretion will not be deemed to have been abused unless, *for example*, the prosecutor builds his case with immunized witnesses but denies the Petitioner a similar opportunity (*see, e.g., People v. Adams, supra*, 53 N.Y.2d at p. 247).

Emphasis added.

This nebulous standard, referenced by the Appellate Division citation to *Chin*, Appendix A, allows for no more than an arbitrary determination by a reviewing court that there was no abuse of prosecutorial discretion. But that offers little, if any, guidance to prosecutors and trial judges in future cases. Thus, *nisi prius* courts have no cognizable test to apply as to what, in a proper case, rises to a level of unconstitutional abuse, violative of either due process or a defendant's right to present a defense.

The New York Court of Appeals' other decisions in this area, all of which antedated *Chin*, offer no greater illumination. *See e.g. People v. Arroyo*, 46 N.Y.2d 928, 930, 415 N.Y.S.2d 205, 206 (1979), where, amidst a finding of no denial of due process, the court simply stated that "[i]t suffices for present purposes to note that the witness here was not an agent of the law enforcement authorities or otherwise in any way a part of the prosecutorial apparatus . . . [citing *Sapia*]." However, the Court never articulated any standard of analysis in furtherance of determining precisely what being "part of the prosecutorial apparatus" might entail.

Even in *Shapiro supra*, wherein the Court of Appeals actually took the rare action of reversing an affirmance of a conviction, the decision was certainly unenlightening. There, the court was confronted with a situation which it viewed to be distinct from what had been involved in *Sapia* and *Arroyo*. In *Shapiro*, given the prosecutor's insistence that certain defense witnesses testify consistent with their prior testimony, those individuals called by the defense invoked the Fifth Amendment in the absence of prosecutorial grants of immunity for any possible perjury charges.

Though addressing its due process-based discussion in *Sapia*, the Court of Appeals merely concluded that "there are times when the exercise of this constitutional right may press on a defendant's due process right to a fair trial and to compulsory process (U.S. Const., 6th, 14th Amendments., N.Y. Const. art. I, sec. 6)" (50 N.Y.2d at 760). Thus, without setting forth any guidelines in

furtherance of measuring the bounds of such standards, the court merely declared:

> Given that the power to confer immunity and thereby to compel testimony from a witness who asserts his privilege resides within the discretion of the prosecutor (see New York Criminal Procedure Law §50.20, subd. 2, par. [b]), in an appropriate case it is not too much to expect that the exercise of this prosecutorial discretion be tempered by an obligation to respond to such a problem. On that principle, in cases in which witnesses favorable to the prosecution are accorded immunity while those whose testimony would be exculpatory of the defendant are not, or in ones where the failure to grant immunity deprives the defendant of vital exculpatory testimony, due process may be violated (*see People v. Sapia, supra,* at p. 166; *People v. Arroyo, supra,* at p. 930; *Earl v. United States*, D.C. Cir., 361 F.2d 531, 534, n.1 (Burger, J.), *cert. den.* 388 U.S. 921; *United States v. Gaither*, D.C.Cir., 539 F.2d 753 (Bazelon, J., statement on denial of rehearing en banc), *cert. den.* 429 U.S. 961; *United States v. Saettele*, 8 Cir., 585 F.2d 307, 310-314 (Bright, J., dissenting); *State v. Broady*, 41 Ohio App.2d 17, 321 N.E.2d 890; Westen, Compulsory Process Clause, 73 Mich.L.Rev. 71, 166-170; Note, Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses, 91 Harv.L.Rev. 1266).

Shapiro, supra, 50 N.Y.2d at 760, 431 N.Y.S.2d at 429.

Only exacerbating this ambiguity, as noted by Justice Marshall in 1990 (*Hunter v. California*) and 1984 (*Autrey v. McKaskle*), is the reality that while some federal circuit courts of appeals believe a judge has no authority at all, others have continued at least two distinct modes of analysis in this area. They include an "effective defense" standard on the one hand, and a "prosecutorial misconduct" standard on the other. *See United States v. Angiulo*, 897 F.2d 1169, 1190-92 (1st Cir.) (contrasting these distinct modes of analysis, and collecting cases), *cert. denied*, 498 U.S. 845 (1990); *United States v. Mohney*, 949 F.2d 1397, 1401 (6th Cir.) (same), *cert. denied*, 504 U.S. 910 (1992); *United States v. Capozzi*, 883 F.2d 608, 613-614 (8th Cir. 1989) (same), *cert. denied*, 495 U.S. 918 (1990); *see also Carter v. United States*, 684 A.2d 331, 338-45 (D.C. Ct. App. 1996) (en banc) (same).

The "effective defense" standard, which is the minority approach, "holds that a court has the inherent power to immunize witnesses whose testimony is essential to an effective defense." *Angiulo*, 897 F.2d at 1190. This "effective defense" standard of analysis, embraced by the **Third Circuit**, *see Government of Virgin Islands v. Smith*, 615 F.2d 964, 969-74 (3d Cir. 1980), and applied to some extent by the **Ninth Circuit**, *see United States v. Lord*, 711 F.2d 887, 891 (9th Cir. 1983), adheres to the notion

> that when it is found that a potential defense witness can offer testimony which is clearly exculpatory and essential to the defense case and when the Government has no strong interest in withholding use immunity, the court

> should grant judicial immunity to the witness in order to vindicate the Petitioner's constitutional right to a fair trial.

Angiulo, 897 F.2d at 1191. *See also United States v. Santtini*, 963 F.2d 585, 597, 598, n. 6, 599 (3d Cir. 1992) (discussing *Smith* and noting the criticism thereof, as well as the limiting of its applicability, in subsequent decisions).

On the other hand, the "prosecutorial misconduct" standard, is relied upon by most Circuits that recognize judicial power in this area. Generally, it entails an analytical approach upon which the district court requires a prosecutor to grant immunity to a defense witness, at risk of dismissal or judgment of acquittal. Usually, "there exists prosecutorial misconduct arising out of the Government's deliberate effort to distort the fact-finding process." *Angiulo*, 897 F.2d at 1190.

For example, the **Second Circuit**, as reiterated in *United States v. Ebbers*, 458 F.3d 110, 119-20 (2d Cir. 2006), *cert denied*, 127 S. Ct. 1483 (2007) and *United States v. Bahadar*, 954 F.2d 821, 826 (2d Cir.), *cert. denied*, 506 U.S. 850 (1992), has enunciated a long-standing "three-part test for requiring the government to grant defense witness immunity at the risk of dismissal of the indictment." *See also United States v. Diaz*, 176 F.3d 52, 115 (2d Cir.), *cert. denied sub. nom., Rivera v. United States*, 528 U.S. 875 (1999); *United States v. Turkish*, 623 F.2d 769, 773 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981). According to this sequential analysis,

> **first**, the district court must find that the government has engaged in discriminatory

> use of immunity to gain a tactical advantage or, through its own overreaching, has forced the witness to invoke the fifth amendment. **Second,** the witness's testimony must be 'material, exculpatory, and not cumulative.' **Third,** the testimony must be unobtainable from any other source.

The remaining courts of appeals, absent any single cogent protocol, pursue different variations of these modes of analysis. Some hold that a district court has residual authority to grant immunity on its own initiative. Others, as noted, determine that the only authority vested in the district court is to compel the prosecutor, in the face of certain necessary factors, to consent to immunity at pains of sanctions. Notably, while most circuit courts discuss the defense proffer in terms of "exculpatory," the Ninth Circuit requires only that the proposed testimony be "relevant."

First Circuit

United States v. Mackey, 117 F.3d 24 (1st Cir.)

> [Petitioner] relies upon the so-called 'effective defense theory,' which posits that a strong need for exculpatory testimony can override even legitimate, good faith objections by the prosecutor to a grant of immunity. This theory has been accepted only in one circuit [citing *Government of the Virgin Islands v. Smith*, 615 F.2d 964, 974 (3d Cir. 1980)], but rejected in a number of circuits [citing *Angiulo*, 897 F.2d at 1191 (collecting citations)]. For reasons

> amply set forth in [*United States v. Turkish*, 623 F.2d 769, 772-79 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981)], we think the majority view is sound and that, in general, courts have no power to compel immunity in the face of a good faith refusal by the prosecutor.
>
> Perhaps an exception to this rule might exist upon very extreme facts. Imagine a case where the prosecutor has only a trivial interest in withholding immunity and-to avoid a complete miscarriage of justice-the defendant has an overwhelming need for specific exculpatory evidence that can be secured in no way other than through the grant of immunity. At least, such a case might present a question under the Due Process Clause of the Fifth Amendment. The present facts are not within a country mile of a constitutional violation.

Cert. denied, 522 U.S. 975 (1997).

Fourth Circuit

United States v. Washington, 398 F.3d 306, 310 (4th Cir.)

> We have consistently held that a district court is without authority to confer immunity on a witness *sua sponte*. [citing *United States v. Klauber*, 611 F.2d 512, 517 (4th Cir. 1979), *cert. denied*, 446 U.S. 908 (1980)] . . . Indeed, as we recently observed . . . 'no power to grant

> immunity is found in the Constitution' [quoting *United States v. Moussaoui*, 382 F.3d 453, 466 (4th Cir. 2004), *cert. denied*, 544 U.S. 931 (2005)]. . .[O]nly the prosecution is entitled to seek witness immunity in a federal criminal case [internal citations omitted] . . . While a district court may, in very limited circumstances, compel a United States Attorney to grant such immunity [citations omitted] . . . [,] [w]e have held that a district court is without authority to issue such an order unless a Petitioner has made (1) 'a decisive showing of prosecutorial misconduct or overreaching and (2) the proffered evidence would be material, exculpatory and unavailable from all other sources' [quoting *United States v. Abbas*, 74 F.3d 506, 512 (4th Cir.), *cert. denied*, 517 U.S. 1229 (1996)].

Cert. denied, 545 U.S. 1109 (2005).

Fifth Circuit

United States v. Whittington, 783 F.2d 1210, 1220 (5th Cir.)

> In this circuit, the compulsory process clause does not entitle the Petitioner to require the government to grant immunity to his witnesses . . . [footnote and internal citations omitted]. Although the Third Circuit has held differently [footnote omitted], we have rejected its view and held . . . [citing *Autry v. Estelle*, 706 F.2d 1394, 1401 (5th Cir. 1983), *cert.*

> *denied* 465 U.S. 1085 (1984)] . . . [footnote omitted], that in the absence of governmental abuse the court may not direct the government to grant use immunity to a defense witness who invokes the fifth amendment.

Cert. denied, 479 U.S. 882 (1986). *See also*, *United States v. Chagra*, 669 F.2d 241, 258-59 (5th Cir. 1982)

> This Circuit has consistently held that a district court does not possess the statutory, common law, or inherent authority either to grant use immunity to a defense witness over the government's objection or to order the government to do so. . . . [footnote omitted]. At the same time, we have suggested without deciding that the federal constitution may in some extraordinary circumstances require either defense witness immunity or some remedial action by a district court to protect a Petitioner's right to a fair trial . . . [footnote omitted] [citing, *inter alia*, *United States v. Thevis*, 665 F.2d 616, 639 (5th Cir. Unit B), *cert. denied*, 456 U.S. 1008 (1982)].

Reh. denied, 673 F.2d 1321 (5th Cir.), *cert. denied*, 459 U.S. 846 (1982), *overruled on other grounds*, *United States v. Tolliver*, 61 F.3d 1189 (5th Cir. 1995).

Sixth Circuit

United States v. Eady, 98 Fed. Appx. 440, 443 (6th Cir. 2004)

> As a general matter, 'a district court is without authority to either grant immunity to a witness who asserts his Fifth Amendment privilege against self incrimination, or to force the government to do so' [citing *United States v. Talley*, 164 F.3d 989, 997 (6th Cir.), *cert. denied*, 526 U.S. 1137 (1999)]. Exceptions to this rule may potentially exist in two narrow circumstances [again citing *Talley* and *United States v. Emuegbunam*, 268 F.3d 377, 401 (6th Cir. 2001) (*cert. denied*, 535 U.S. 977 (2002)] [rejecting the 'effective defense exception']. We have described the first circumstance as follows: '[I]n certain limited situations, the government's selective grant of immunity to its own witnesses, while denying immunity to the Petitioner's witnesses, may deprive the defense of a fair trial, and in some cases require a judicially compelled immunity grant' [citing *Talley*, 164 F.3d at 997]. The second possible circumstance . . . is when it is necessary 'to remedy prosecutorial misconduct' [citing *Talley* at 998]. A defendant seeking to show that a district court erred in failing to grant immunity under this circumstance would have to show that 'the prosecution has deliberately distorted the judicial fact-finding process' [citing *Emuegbunam*, 268 F.3d at 401].

Seventh Circuit

United States v. Schweihs, 971 F.2d 1302, 1315 (7th Cir, 1992)

> The rule in this circuit is that the federal courts do not have the power to grant immunity to a witness absent a request from the U.S. Attorney [citing *United States v. Herrera-Medina*, 853 F.2d 564, 568 (7th Cir. 1988)]. Congress conferred that power exclusively on the executive branch [citing 18 U.S.C. § 6003 (1989) and *United States v. Frans*, 697 F.2d 188, 191 (7th Cir.), *cert. denied*, 464 U.S. 828, 104 S.Ct. 104, 78 L.Ed.2d 107 (1983)]. The prosecutor's power to refuse to seek immunity is limited by the Petitioner's right to due process [citing *United States v. Hooks*, 848 F.2d 785, 799 (7th Cir. 1988)]. We 'will not review a prosecutor's immunization decisions in the absence of substantial evidence showing that the prosecutor's actions amounted to a clear abuse of discretion violating the due process clause' [quoting *United States v. Taylor*, 728 F.2d 930, 935 (7th Cir. 1984) (internal citation omitted)]. An abuse of discretion occurs when the prosecutor uses . . . immunization authority . . . intentionally to distort the fact-finding process [citing *Frans*, 697 F.2d at 191].

Cert. denied, 520 U.S. 1149 (1997).

But see United States v. Herrera-Medina, 853 F.2d at 56

> In an appropriate case the refusal of the government to immunize a defense witness might be at once so damaging to the defense and so unjustifiable in terms of legitimate governmental objectives that the refusal to grant immunity would be a denial of due process of law to the Petitioner and preclude his conviction . . .

Eighth Circuit

United States v. Capozzi, supra, 883 F.2d at 613-614

> Appellant urges that this court adopt the [Third Circuit's] *Smith* formulation. Neither the Supreme Court nor this Court have ruled on whether a court has inherent authority to grant use immunity. We have, however, previously indicated our doubt that such a power lies in the judiciary [internal citations omitted]. Every court of Appeals which has considered the question has rejected the Third Circuit's *Smith* holding as being in violation of the doctrine of separation of powers . . . [internal citations omitted]. We decline to follow *Smith* and reassert our doubt that the Court has the power to order such a grant of judicial immunity.

> Even assuming a district court has authority to immunize defense witnesses, unaided by 18 U.S.C. §§ 6002 and 6003, it is clear that such an order is an extraordinary remedy, to be used sparingly, and then only where the proffered evidence is *clearly exculpatory* . . . [footnote and internal citations omitted] [emphasis in original]

United States v. Kehoe, 310 F.3d 579, 591 (8th Cir. 2002)

> We have stated that, assuming a district court has such authority, granting a defense witness immunity after he has invoked the Fifth Amendment privilege is an 'extraordinary remedy to be used sparingly and then only where the proffered evidence is clearly exculpatory' [internal quotes omitted] [citing *United States v. Blanche*, 149 F.3d 763, 769 (8th Cir. 1998)].

Cert. denied, 538 U.S. 1048 (2003).

United States v. Washington, 318 F.3d 845, 855 (8th Cir.)

> The power to grant immunity is vested in the prosecutor. 'The government has broad discretion in its grants of immunity. It is the prerogative of the Attorney General and his designees to determine whether a grant of immunity is in the public interest under 18 U.S.C. § 6003' [internal quotes omitted]

> [citing the Seventh Circuit's decision in *United States v. Hooks*, *supra*]. The defendant must make a 'substantial evidentiary showing' that the government intended to distort the judicial fact-finding process before we will depart from the strong tradition of deferring to prosecutorial discretion. [citing *Hooks* at 802]. As an appellate court, we will not review a prosecutor's immunization decisions unless the prosecutor's actions amounted to a clear abuse of discretion violating the due process clause [citing *Hooks* at 799].

Cert denied, 540 U.S. 899 (2003).

Ninth Circuit

Williams v. Woodford, 384 F.3d 567, 600 (9th Cir. 2004)

> [T]he prosecution's refusal to grant use immunity to a defense witness denies the Petitioner a fair trial only when (1) the witness's testimony would have been relevant, and (2) the prosecution refused to grant the witness use immunity with the deliberate intention of distorting the fact-finding process [citing *United States v. Westerdahl*, 945 F.2d 1083, 1086 (9th Cir. 1991) and *United States v. Lord*, *supra*, 711 F.2d at 891]. To demonstrate the prosecutorial misconduct of the second prong [Petitioner] must show that the prosecution intentionally caused a defense

> witness to invoke the Fifth Amendment right against self-incrimination, or that the prosecution granted immunity to a government witness in order to obtain the witness's testimony, but denied immunity to a defense witness whose testimony would have directly contradicted that of the government witness [citing *United States v. Duran*, 189 F.3d 1071, 1087 (9th Cir. 1999), *cert denied*, 529 U.S. 1081 (2000)].

Reh. denied, 396 F.3d 1059 (9th Cir. 2005), *cert. denied sub nom., Williams v. Brown*, 546 U.S. 934 (2005);

United States v. Whitehead, 200 F.3d 634, 640 (9th Cir.)

> To satisfy the relevance prong, a defendant need not show that the testimony sought was either clearly exculpatory or essential to the defense; the testimony need be only relevant.

Cert. denied, 531 U.S. 885 (2000).

But see United States v. Lord, supra, 711 F.2d at 891-92

> We agree with the Third Circuit's holding in *Government of Virgin Islands v. Smith, id.* at 968, that an unrebutted prima facie showing of prosecutorial misconduct that could have prevented a defense witness from giving relevant testimony justifies remand for an evidentiary hearing. Therefore, we reverse

> and remand this case for an evidentiary hearing on whether the prosecutor intentionally distorted the fact-finding process by deliberately causing Cook to invoke his fifth amendment privilege. If the district court finds such prosecutorial misconduct by a preponderance of the evidence . . . [footnote omitted], it should enter a judgment of acquittal for Lord unless the prosecution invokes 18 U.S.C. § 6002-6003 by asking the district court to extend use immunity to Cook at a new trial.

Tenth Circuit

United States v. Serrano, 406 F.3d 1208, 1218 (10th Cir.)

> In this case, the district court correctly denied Defendant's motion to grant Michael Serrano and Manuel Franco immunity. Section 6003 only permits a district court to enter an immunity order upon the request of a United States attorney and the United States attorney made no such request here. The district court did not have the inherent authority to grant Serrano and Franco immunity in the 'interests of justice.' Defendant's reliance upon the Third Circuit's case in *Smith*, 615 F.2d at 968-69, to argue the contrary is misplaced. We explicitly rejected the reasoning in *Smith* over twenty years ago. *See United States v. Hunter*, 672 F.2d 815, 818 [10th Cir.1982] [concluding

> 'courts have no power to independently fashion witness use immunity under the guise of due process'], *overruled on other grounds, United States v. Call*, 129 F.3d 1402, 1404 & n. 2 [10th Cir.1997].

Cert. denied, 546 U.S. 913 (2005).

Eleventh Circuit

United States v. Sawyer, 799 F.2d 1494, 1506-07 (11th Cir. 1986)

> In *United States v. Thevis*, 665 F.2d 616, 639 [5th Cir. Unit B], *cert denied* 456 U.S. 1008 [1982], our predecessor court, after considering various policy arguments, concluded that district courts have no authority to grant immunity to a defense witness simply because that witness may possess exculpatory information. We are bound by the decision in *Thevis*, [citing *United States v. Gottesman*, 724 F.2d 1517, 1524 (11th Cir. 1984)], and accordingly find no error in the court's refusal to grant Siegel use immunity. Moreover, although we recognized in *Gottesman* that a compelling argument could be made for judicially compelled use immunity in cases of governmental abuse of the immunity process, we declined to address that argument because we found no evidence of such misconduct. [citing *Gottesman* at n.9].

Cert. denied, sub nom, Leavitt v. United States, 479 U.S. 1069 (1987).

District of Columbia Circuit

In *United States v. Perkins*, 138 F.3d 421, 424 (D.C. Cir.) (upon discussing *United States v. Lugg*, 892 F.2d 101 [D.C. Cir. 1989] and *United States v. Heldt*, 668 F.2d 1238 [D.C. Cir. 1981], *cert. denied*, 456 U.S. 926 [1982]), the court lent renewed vigor to *Heldt's* quoting the Second Circuit in *United States v. Turkish*, *supra*, noting "it is not the proper business of the trial judge to inquire into the propriety of the prosecution's refusal to grant use immunity to a prospective witness." [internal quotes omitted]). The *Perkins* court recalled, however, that in *Lugg* it had been noted that "[s]ome cases have indicated that the government may be compelled to grant defense witness immunity in 'extraordinary circumstances.' 892 F.2d at 104"), *cert. denied*, 523 U.S. 1143 (1998). *But see Earl v. United States*, *supra*, (Burger, J.) 361 F.2d at 534, n. 1; *United States v. Gaither*, *supra*.

District of Columbia Court of Appeals

Carter v. United States, *supra*, 684 A.2d at 338-45, (upon rejecting *Government of Virgin Islands v. Smith*, the en banc court stated: "Preliminarily, we agree with the overwhelming number of courts, especially in the federal circuits, that have rejected the concept of *judicially imposed* immunity" [emphasis in original]. * * * "We agree with most federal circuit courts which have adopted what has been termed the 'prosecutorial misconduct' doctrine . . . [footnote omitted].").

C. Discussion

This petition presents a most appropriate vehicle for the Supreme Court to finally address this issue. The Court is herein positioned to determine, not only when a prosecutor may be required to grant or seek immunity, but whether a trial judge has the authority to order immunity, at pains of acquittal, and thereby delineate the appropriate standard of analysis that a judge must apply.

No rote immunity request is presented in this case, which merely involved some tangential witness who was sought by the defense. Rather, according to the requested witness's own statements to the supervising detective that interviewed him in Atlanta, *where he had fled following the shooting*, Amarprit Anu Singh directly implicated himself in the subject criminality. He did so by claiming that he entered the vehicle in question with other identified persons, whom he knew to be armed, while intending to attack Rocky. Crucially, in doing so, Anu specifically excluded Petitioner as a listed passenger. Surely, Anu was not someone who *might* have possessed exculpatory information; rather, by the supervising detective's own account, he was a potential witness that *actually* possessed first-hand, exculpating information, based on his own direct complicity.

Yet, despite requests from the supervising detective for authorization to place Anu under arrest for the offense with which Petitioner alone was charged, *the District Attorney adamantly refused*. Instead, the prosecutor — with manifest disingenuousness that was never challenged by the trial judge — simply claimed

that there had been a second caliber bullet proved, *knowing full well that, according to her own forensic evidence, only one weapon and one shooter could possibly have been involved in the subject incident.* Surely, since her rejoinder to Petitioner's application was premised on information that had always been known to her, if the prosecutor truly believed it to have relevance, she would have authorized Anu's arrest when the supervising detective requested such authority. Again, however, she refused to do just that, opting instead to deny immunity to a witness whom, in reality, she had no interest in prosecuting.

As counsel aptly noted, such a position was completely untenable. Accordingly, counsel urged that the District Attorney's adamant refusal to give immunity was "preventing my client from receiving a fair trial. I think certainly, in terms of due process of law, it prevents him from receiving that due process of law."

Under such circumstances, depending on what standard of analysis, if any, might be embraced by this Court pursuant to plenary review, the arbitrary refusal to allow Petitioner to call Anu to the stand under a grant of immunity might well be viewed as having undermined Petitioner's due process right to conduct his defense by precluding the calling of a crucial witness who was in a clear position to exculpate him. Respectfully, a standard must be established, once and for all, for trial judges to weigh the legitimacy of such applications, and upon which reviewing courts can determine if either judicial or prosecutorial discretion has been abused. *See e.g. Batson v. Kentucky*, 476 U.S. 79, 98 (1986) ("Nor may the prosecutor rebut the defendant's case [of discriminatory jury selection] merely by denying that he had a discriminatory motive or "'affirm[ing] [his] good faith in making individual selections'").

If anything, we submit that the Court should finally elaborate upon whether criminal defendants' Sixth Amendment rights include having the Government bestow immunity upon an obviously exculpatory defense witness whom it has absolutely no intent of prosecuting. The Court should thus explicate upon its statement in *Pennsylvania v. Ritchie*, *supra*, 480 U.S. at 56 and *Taylor v. Illinois*, 484 U.S. at 408, "that criminal Petitioners have the right to the *government's assistance* in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." Emphasis added.

Because, at present, no uniform standard for either prosecutors or trial judges exists, it is clear that, absent the Court's review of the issue presented, disparate rulings will continue to abound across the nation. Given the facts of this case, resulting in what was, at best, an unconsidered rationale provided by the Appellate Division, this Court is presented with a most appropriate vehicle with which to establish essential uniformity. Petitioner — who continues to profess his innocence of a crime for which he is now serving a term of imprisonment of twenty-five years to life — begs mightily that this opportunity not again be lost.

CONCLUSION

The Petition for a Writ of Certiorari Should Be Granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT ARGUED DECEMBER 14, 2007

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division: Second Judicial Department

D17585
W/hu

Argued - December 14, 2007

____ AD3d ____

FRED T. SANTUCCI, J.P.
ROBERT A. LIFSON
JOSEPH COVELLO
THOMAS A. DICKERSON, JJ.

2004-11109

The People, etc., respondent, v Tejpal Singh, appellant.

(Ind. No. 2733/00)

DECISION & ORDER

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Aloise, J.), rendered December 14, 2004, convicting him of murder in the second degree, attempted murder in the second degree, assault in the first degree, criminal possession

of a weapon in the second degree, and reckless endangerment in the first degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

In order for a declaration against penal interest to be admissible at trial, the proponent must establish that (1) the declarant was unavailable as a witness at trial; (2) the declarant was aware that the statement was adverse to his or her penal interest when made; (3) the declarant had competent knowledge of the facts underlying the statement; and (4) "most important, supporting circumstances independent of the statement itself must be present to attest to its trustworthiness and reliability" *(People v Settles*, 46 NY2d 154, 167; *see People v Linyear*, 25 AD3d 811).

Here, the Supreme Court properly precluded the out-of-court statements of four witnesses, finding that the statements did not qualify for admission as declarations against penal interest because the defendant failed to meet his burden of proving that the declarants knew that their statements were, in fact, against their penal interests (*see People v Carter*, 276 AD2d 347; *People v Raife*, 250 AD2d 864). The statements, which were largely exculpatory and made under circumstances which suggest that they were intended to minimize each declarant's criminal involvement, were not clearly opposed to each declarant's penal interest (*see People v Martin*, 8 AD3d 883; *People v Raife*, 250 AD2d 864).

Appendix A

The defendant's contention that the prosecutor abused her discretion by denying immunity to a defense witness is without merit (*see* CPL 50.30; *People v Chin*, 67 NY2d 22, 32; *People v Williams*, 169 AD2d 798).

SANTUCCI, J.P., LIFSON, COVELLO and DICKERSON, JJ., concur.

ENTER:

s/ James Edward Pelzer
James Edward Pelzer
Clerk of the Court

APPENDIX B — CERTIFICATE OF THE COURT OF APPEALS FOR THE STATE OF NEW YORK DENYING LEAVE DATED MAY 13, 2008

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. EUGENE F. PIGOTT, JR.,
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

TEJPAL SINGH,

Appellant.

CERTIFICATE DENYING LEAVE

I, EUGENE F. PIGOTT, JR., Associate Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission is hereby denied.

Dated: Buffalo, New York
this 13 day of May, 2008

Appendix B

s/ Eugene F. Pigott, Jr.
Associate Judge

* ***Description of Order***: Order of the Appellate Division, Second Judicial Department, entered January 15, 2008, affirming a judgment of Supreme Court, Queens County, rendered December 14, 2004.

Supreme Court, U.S.
FILED
OCT 8 - 2008
OFFICE OF THE CLERK

2

No. 08-165

IN THE

Supreme Court of the United States

TEJPAL SINGH,

Petitioner,

v.

THE STATE OF NEW YORK,

Respondent.

On Petition For Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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October 9, 2008

QUESTION PRESENTED

Whether the prosecution abused its discretion in denying immunity to a defense witness where the witness had been directly implicated in the murder for which petitioner was on trial, where ballistics evidence and witness statements suggested multiple shooters, and where the prosecution did not otherwise engage in misconduct or build its own case on immunized testimony.

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No. 08-165

In the

SUPREME COURT OF THE UNITED STATES

October Term, 2008

TEJPAL SINGH,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

On August 25, 1996, Kamaljit and Ramjit Singh were shot while standing with others on a street corner in Queens, New York. Petitioner, who was riding in an SUV with tinted windows along with several other

members of his group, was seen firing out the front passenger window of the vehicle at the two men. Both victims were shot in the back as they attempted to flee. Ramjit survived but Kamaljit died at the hospital shortly after the incident. Ballistics evidence recovered from the scene of the crime included .45 caliber shell casings and a .38 caliber bullet, prompting a ballistics examiner to conclude that two weapons had been used in the shooting.

Despite an extensive search by the New York City Police Department, petitioner was not located until four years later when evidence was found of telephone calls from petitioner's family to Canada. With the assistance of Canadian law enforcement authorities, petitioner was arrested in August of 2000 and extradited to the United States.

For his acts, petitioner was charged with acting in concert to murder Kalamjit Singh (New York Penal Law § 125.25[1],[2] [two counts]), and with the attempted murder and first-degree assault of Ramjit Singh (New York Penal Law §§ 110/125.25[1]; 120.10 [1],[3] [two counts]).[1]

Petitioner proceeded to trial before the Honorable Michael B. Aloise, Justice of the New York State Supreme Court, and a jury. In the prosecutor's

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[1]Petitioner was also charged, under an acting-in-concert theory, with Reckless Endangerment in the First Degree (New York Penal Law § 120.25), Criminal Possession of a Weapon in the Second Degree (New York Penal Law § 263.03), and Criminal Possession of a Weapon in the Third Degree (New York Penal Law § 265.02[4]).

opening statements, she discussed the "two guns" theory, explaining that she could not tell the jurors if there was a second shooter or if petitioner had two guns, but maintaining that it did not matter because petitioner was charged with acting in concert with others to commit the crime. During the state's case, Ramjit, who knew petitioner prior to this incident, testified about the shooting and identified petitioner as firing a weapon from the front passenger seat. Another witness, Sukjinder Singh, who had been standing on the sidewalk with the two victims prior to the shooting and who also knew petitioner prior to the shooting, identified petitioner as being in the car. Police witnesses described the collection and microscopic comparison of the ballistics evidence, including the .45 caliber shell casings found on the street and the .38 caliber bullet found just inside the building on the corner where the shooting took place.[2]

In his defense, petitioner offered statements taken from four witnesses as declarations against penal interest. Three of these statements suggested that another man, Anu Singh, had fired a weapon, and two of the statements indicated that there had been more than one shooter. In one of the statements, "Jassa" Singh, who resided in India at the time of trial, told a defense investigator that he was in the SUV when shots were fired and he identified two men, Anu Singh and "Vicki," as both possessing weapons and having fired out the window. According to Jassa, one

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[2]This bullet was found near a shirt bearing a fresh blood stain. The shirt's owner was never located.

man reached across another to fire his weapon. "Vicki," who resided in Canada at the time of trial, also made a statement to a defense investigator, and, although he claimed that he did not see the shooting, "Vicki" believed Anu had fired because Anu was seated on the front passenger side of the SUV. In another statement, one "Lali" indicated that, although he was in the car from which the shots were fired, he did not see the shooting because he was frightened and ducked when he heard gunfire. Finally, Anu Singh made a statement to police investigators indicating that two men possessed weapons on the evening of the shooting. Anu's written statement was read into the record, in part, as follows:

> I know Jassa and Vicki had gun because I see in the house with the guys we are traveling in the, it looks like, I'm not sure of the word. I am not sure of the word. Jinder saw the guys Goldie, Rocky, some other people in the street went. We were went. We were – I don't know the word there. Vicki said to me move back and saw gun in hand. The pat to the window he was. I don't know the word. Jassa came to front and he pulled the gun out the same window then somebody also then we something Jinder house. We went to the homes and left Jinder house and left with Tej [petitioner].

After an extensive colloquy, the trial court refused to admit these statements as declarations against penal interest. The trial court reasoned that

none of the declarants had indicated his own complicity in the shooting.

Defense counsel also sought to obtain the live testimony of Anu, who lived in Georgia at the time of trial. After Anu was asked to testify, he spoke with an attorney who worked for his employer in Georgia. Anu subsequently declined to cooperate, refusing to appear at the trial. As a result, the trial court authorized service of a subpoena and signed a material witness order to produce Anu. When Anu was brought to New York, he was accompanied by his Georgia attorney, and petitioner's attorney also asked a colleague from New York to assist in the representation of the witness. Anu took the stand outside the presence of the jury and invoked the Fifth Amendment in response to all questions posed.

Defense counsel then requested that "the People convey immunity upon this individual so he may testify on behalf of the defendant." In response, the prosecutor, who under New York law could confer only transactional immunity on the witness (*see* New York Criminal Procedure Law §§ 190.40, 50.20), declined to do so. She cited the ballistics evidence that two guns were involved in the incident, and the court noted that three of the statements offered by petitioner indicated that the witness possessed one of those weapons. Petitioner's subsequent mistrial motion on this ground was denied.

On appeal to the New York State Appellate Division, Second Judicial Department, petitioner argued that the trial court erred in failing to admit the

witness's statements as declarations against penal interest and that the prosecutor abused her discretion in denying counsel's request to immunize Anu. Petitioner did not argue, however, that the court had "inherent authority" to grant immunity to the witness and should have done so independent of the prosecutor's decision. The Appellate Division affirmed the judgment. *People v. Singh*, 47 A.D.3d 733 (2d Dept. 2008). The court specifically held that "[t]he defendant's claim that the prosecutor abused her discretion by denying immunity is without merit," citing New York's transactional immunity statute and *People v. Chin*, 67 N.Y.2d 22 (1986), which holds that a prosecutor who grants immunity to a defense witness necessarily confers full transactional immunity under New York law. 47 A.D.3d at 734.

Petitioner subsequently sought leave to appeal to the New York Court of Appeals, arguing once again that the prosecutor abused her discretion. Petitioner did not argue that the trial court had the inherent authority to immunize the witness, independent of the prosecutor's decision. A judge of the New York Court of Appeals denied leave to appeal, without opinion. *People v. Singh*, 10 N.Y.3d 870 (2008).

Petitioner now seeks a writ of certiorari directed to the Appellate Division, New York's intermediate appellate court.

REASONS FOR DENYING THE WRIT

Petitioner argues that this Court should grant certiorari because of a split among the federal circuit

courts as to the circumstances under which a prosecutor may be compelled to grant immunity to allow a defense witness to testify. This argument should be rejected, and certiorari denied, for at least two reasons. First, contrary to petitioner's claim, no split of authority currently exists on this issue, as only one circuit has at any time deviated from what petitioner describes as the "majority view," and that circuit has since limited its sole errant decision strictly to its facts, effectively eliminating its precedential value. Second, in this case, the outcome would be the same regardless of whether the issue were analyzed under the majority view or the lone, now discredited case adopting a different position. Thus, petitioner has failed to establish a genuine conflict or that this case presents facts that would implicate the purported distinction among the circuits. Moreover, in making his conflict argument, petitioner conflates two separate issues, only one of which was properly raised in state court, and thus only one of which would be reviewable here. For these reasons, this Court should decline to grant review in this case.

A. The Question of Whether a State Court Has the Inherent Authority to Grant Immunity is Not Reviewable in This Court.

At the outset, it is important to distinguish between two related but analytically distinct issues identified by petitioner in the body of the petition, only one of which would be properly before this Court should it grant review. In his "Reasons for Granting the Writ," petitioner first raises the issue of whether a

court possesses the inherent authority to grant immunity to a defense witness when the prosecution denies it. Petition at 9. This issue raises questions concerning the historical jurisdiction of state and federal courts, whether provisions of the bill of rights may be read to confer jurisdiction on a state or federal court that it does not otherwise possess, and whether a court would offend the separation of powers clause by usurping authority otherwise reserved to the prosecution. *See, e.g., United States v. Turkish*, 623 F.2d 769, 773-76 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981); *Government of Virgin Islands v. Smith*, 615 F.2d 964, 969-74 (3d Cir. 1980). The second, analytically distinct issue is whether, under a given set of circumstances, a prosecutor may be deemed to have abused his or her discretion in declining to grant immunity. *See* Petition at 10; *Smith*, 615 F.2d at 969-70; *United States v. Ebbers*, 458 F.3d 110, 119-120 (2d Cir. 2006), *cert. denied*, 127 S.Ct. 1483 (2007). This issue raises questions concerning the conduct of the prosecutor and his or her possible overreaching, rather than the jurisdiction possessed by the trial court.

The first issue is not presented by this case because petitioner did not properly present that contention to the state courts. It is the "settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below." *Kentucky v. Stincer*, 482 U.S. 730, 747 n. 22 (1987) (internal quotation marks and citations omitted); *see also Cardinale v. Louisiana*, 394 U.S. 437

(1969); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973). This is because, among other things, in a federal system, it is important for the state courts to consider the federal constitutional issue first before the federal judiciary steps in to correct any error. *Cardinale*, 394 U.S. at 438; *Illinois v. Gates*, 462 U.S. 213, 221 (1983). In order to comply with the requirement that the issue first be presented to the state courts, the petitioner must raise the issue not only in the trial court but also on appeal. *Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945); Eugene Gressman, Kenneth Geller, Stephen Shapiro, Timothy Bishop, and Edward Hartnett, *Supreme Court Practice* § 3.18(c) (9th ed. 2007). This includes raising the issue in the state's highest court and, if different, in the court that issued the decision that this Court is asked to review. *See Adams v. Robertson*, 520 U.S. 83, 86 (1997) ("With 'very rare exceptions,' we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review"; citations omitted); *Beck v. Washington*, 369 U.S. 541, 549-53 (1962) (equal protection issue not reviewable because not raised in state supreme court, although other constitutional issues properly presented).

Here, petitioner failed to raise the "inherent authority" issue properly in either state appellate court.[3] On appeal to the intermediate appellate court,

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[3]In the trial court, petitioner stated at one point, "I would ask the court to convey immunity on [the witness]." Petitioner did not,

which issued the decision that petitioner now asks this Court to review (Petition at 1), petitioner argued that the prosecution abused its discretion by not granting immunity, but did not argue that the court had the inherent power to grant immunity or that it should have done so over the prosecutor's objection. Similarly, in his application for discretionary review in the state's highest court, petitioner again raised the issue only in terms of the prosecutor's abuse of discretion, rather than the inherent authority of the court to grant immunity. Because petitioner failed to raise this contention in either of these courts, the issue would not properly be before this Court for its consideration if certiorari were granted.

Indeed, this circumstance alone provides sufficient cause to deny the petition. Should the Court grant certiorari, its review of the issues potentially raised under circumstances such as those here would be severely truncated. The "inherent authority" issue is frequently raised in cases such as petitioner's, but this Court would be unable to address that issue in this case. Moreover, many of the cases cited by petitioner in connection with the purported split of authority among the circuits involve the "inherent authority" issue. Thus, the split, if indeed there is any at all, largely involves a question not presented by this case. For these reasons alone, this Court should decline to grant certiorari.

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however, invoke the "inherent authority" of the court, either as derived from state case law or federal constitutional principles.

B. No Conflict Exists Among the Circuit Courts on the Question Raised by Petitioner.

Petitioner argues that the circuit courts have used two different "modes of analysis" in determining whether a prosecutor may be compelled to grant immunity to a defense witness. According to petitioner, one view adopts an "effective defense" theory, under which a court may exercise inherent authority to immunize a witness if the witness is required for an effective defense. Petition at 20. The "prosecutorial misconduct" view, on the other hand, allows a court to dismiss a case or order a prosecutor to grant immunity when the prosecutor has overreached, by, for example, intimidating the defense witness with threats of prosecution or building his case on immunized testimony. Petition at 21. Contrary to petitioner's claims, no split of authority currently exists among the circuit courts sufficient to warrant review here. The sole circuit that purportedly adopted the "effective defense" theory has posited this theory solely with regard to the "inherent authority" question not presented by this case. Moreover, that court has since limited its own case strictly to its facts, virtually eliminating its precedential value. Accordingly, petitioner has failed to establish a "substantial conflict" warranting a grant of certiorari in this case. *See Boggs v. Boggs*, 520 U.S. 833, 839 (1997).

According to petitioner, the "effective defense" theory was adopted by the Third Circuit twenty-eight years ago in the case of *Government of Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980). There, the Third Circuit first addressed whether the prosecution had

abused its discretion in declining to grant immunity. On this issue, the court, after finding a *prima facie* case of prosecutorial misconduct, remanded the matter for an evidentiary hearing to determine whether the prosecutor acted with the "deliberate intention of distorting the fact-finding process." *Id.* at 969. Such a finding, according to the court, would justify dismissing the case unless the prosecution consented to confer statutory immunity. The court alternatively theorized, however, that a trial court may have its own inherent authority to grant immunity under certain circumstances, regardless of the objection of the prosecution. Such a grant of authority would be "clearly limited," requiring a showing, *inter alia*, that the proffered testimony is clear, unambiguous, and exculpatory, the testimony is essential to the defense, and the government has no strong countervailing interest.

This single case is insufficient to establish a substantial split of authority for several reasons. First, on the only issue presented by the case at bar – the circumstances under which a prosecutor will be deemed to have abused his or her discretion in denying immunity – *Smith* is consistent with the other federal circuits that require a showing of serious prosecutorial misconduct. Indeed, on this issue, *Smith* specifically required the defense to establish, at an evidentiary hearing, that the prosecutor engaged in misconduct by refusing to grant immunity "with the deliberate intention of distorting the fact-finding process." *Id.* at 969. As the Third Circuit specifically stated with regard to this issue, "Absent this type of prosecutorial misconduct, defendant is foreclosed from insisting that

statutory immunity be granted his witness." *Id.* at 968. Moreover, before even taking the step of remanding for a hearing, the Third Circuit first found a *prima facie* case of prosecutorial misconduct. *Id.* at 969. Thus, as to this issue, the Third Circuit's decision requires a showing of serious prosecutorial abuse, just as do the circuits cited as having adopted the "prosecutorial misconduct" standard. *Id.* at 968-69.

Second, even on the inherent-authority issue, the Third Circuit quickly limited the *Smith* decision to its own specific facts. Indeed, the Third Circuit has expressly acknowledged that "*Smith* has subsequently been limited to its particular facts by this court." *United States v. Santtini*, 963 F.2d 585, 598 n. 6 (3d Cir. 1992); *see United States v. Lowell*, 649 F.2d 950, 965 (3d Cir. 1981) (comparing and distinguishing facts of *Smith* and declining to extend *Smith* beyond those facts). And in the twenty-eight years since *Smith* has been decided, the Third Circuit has never concluded that *Smith* required or permitted a trial court to grant immunity, despite the frequent efforts of defendants to take advantage of the *Smith* decision.[4] In addition,

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[4]*See Virgin Islands v. Edwards*, 233 Fed. Appx. 167 (3d Cir. 2007); *United States v. Leary*, 206 Fed. Appx. 111 (3d Cir. 2006); *United States v. Gaudelli*, 134 Fed. Appx. 565 (3d Cir. 2005); *United States v. Thomas*, 357 F.3d 357 (3d Cir. 2004); *United States v. Mack*, 78 Fed. Appx. 171 (3d Cir. 2003), *cert. denied*, 541 U.S. 956 (2004); *United States v. Cohen*, 171 F.3d 796 (3d Cir. 1999); *United States v. Hamilton*, 46 F.3d 271 (3d Cir. 1995); *United States v. Santtini*, 963 F.2d 585 (3d Cir. 1992); *United States v. Ammar*, 714 F.2d 238 (3d Cir.), *cert. denied sub nom. Stillman v. United States*, 363 U.S. 936 (1983); *United States v. Bazzano*, 712 F.2d 826 (3d Cir. 1983); *United States v. Steele*, 685 F.2d 793 (3d Cir.), *cert. denied sub nom. Mothon v. United States*,

since *Smith*, trial courts within the Third Circuit have noted the extremely limited applicability of that case, particularly in light of this Court's intervening pronouncement in *Pillsbury Co. v. Conboy*, 459 U.S. 248, 260-61 (1983), that "[n]o court has authority to immunize a witness." *See, e.g., United States v. Payment Processing Co.*, 443 F.Supp.2d 728, 733 (E.D. Penn. 2006) (questioning whether *Smith* could be reconciled with this Court's statement in *Conboy*, explaining *Smith's* "limited vitality," and stating that "*Smith*'s reach is most likely limited to misconduct involving the government's use of the immunity process itself"); *United States v. Pratt*, 2007 U.S. Dist. Lexis 41155 *3-4 (W.D. Pa. June 6, 2007) (Third Circuit "consistently has limited Smith to its unique facts"); *United States v. Throckmorton*, 2006 U.S. Dist. Lexis 8372 *4 (W.D. Pa. March 3, 2006) (noting that Third Circuit has never applied *Smith* to authorize grant of judicial immunity and that *Smith* has been limited to its facts).

Moreover, since *Smith*, the Third Circuit has suggested that its finding of inherent authority was based on the court's supervisory powers over lower federal courts. *United States v. Acetturo*, 783 F.2d 382, 396 (3d Cir. 1986) ("In various circumstances, this court has used its inherent supervisory power to establish rules that will effectuate the defendant's constitutional rights"; citing *Smith*). This would explain the absence of any Third Circuit case in the last 28 years discussing *Smith* as applied to state court judgments.

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459 U.S. 908 (1982); *United States v. Lowell*, 649 F.2d at 950.

In short, since *Smith* was decided, the doctrine has been so limited by the court that created it that its precedential value is virtually nil, and its effect virtually non-existent, even within the Third Circuit. Thus, *Smith* is hardly sufficient by itself to create a genuine conflict worthy of this Court's review.

Petitioner also contends, however, that the Ninth Circuit has adopted *Smith*'s effective-defense theory, at least to some degree. *See* Petition at 20. This is not so. In *United States v. Lord*, 711 F.2d 887 (9th Cir. 1983), cited by petitioner, the Ninth Circuit adopted only the "prosecutorial misconduct" portion of the *Smith* opinion, remanding for a hearing based on an "unrebutted *prima facie* showing of prosecutorial misconduct." *Id.* at 891. In fact, the Ninth Circuit, referencing the "inherent authority" portion of the *Smith* opinion, expressly stated that it was not "address[ing] this alternative theory." *Id.* at 891 n.2. More recently, the Ninth Circuit has made clear that it requires a showing of prosecutorial misconduct when the defense claims that a defense witness should have been immunized. *Williams v. Woodford*, 384 F.3d 567, 600 (9th Cir. 2004) (requiring showing that "(1) the witness's testimony would have been relevant, and (2) the prosecution refused to grant the witness use immunity with the deliberate intention of distorting the fact-finding process"), *cert. denied sub nom. Williams v. Brown*, 546 U.S. 934 (2005).

Moreover, contrary to petitioner's further suggestions, the minor variations among the courts adopting the "prosecutorial misconduct" mode of analysis do not establish a difference of opinion

warranting review. First, these circuit courts have all uniformly and unequivocally rejected the alternative theory in *Smith* allowing a court to grant immunity based solely on the defendant's need for an effective defense. *See United States v. Anguilo*, 897 F.2d 1169 (1st Cir. 1990) (citing "nearly universal" rejection of effective-defense theory and collecting cases), *cert. denied sub nom. Granito v. United States*, 498 U.S. 845 (1990); *United States v. Capozzi*, 883 F.2d 608, 613-14 (8th Cir. 1989) ("Every court of appeals which has considered the question has rejected the Third Circuit's *Smith* holding"), *cert. denied*, 495 U.S. 918 (1990); *see also United States v. Castro*, 129 F.3d 226, 232 (1st Cir. 1997) (referring to the "late, unlamented effective defense theory"), *cert. denied*, 523 U.S. 1100 (1998). Second, all of the circuit courts that have been squarely confronted with the issue have articulated the same fundamental requirements for compelling a prosecutor to grant immunity: a substantial showing of prosecutorial overreaching, often phrased in terms of a deliberate attempt to distort the fact-finding process or to intimidate a witness, and a showing of the defendant's need, usually including the clear exculpatory value of the testimony and the inability to obtain the testimony elsewhere. This test, with only slight variations, has explicitly been adopted by the Second, Fourth, and Ninth Circuits.[5] The Eighth

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[5] *See United States v. Ebbers*, 458 F.3d 110, 119-20 (2d Cir. 2006) (requiring demonstration of overreaching, that proffered testimony is "material, exculpatory and not cumulative," and that evidence is "[not] obtainable from any other source"), *cert. denied*, 127 S.Ct. 1483 (2007); *United States v. Washington*, 398 F.3d 306, 310 (4th Cir.), *cert. denied*, 545 U.S. 1109 (2005) (requiring "decisive showing of prosecutorial misconduct or overreaching"

Circuit has similarly adopted this view, requiring in separate cases that the proffered evidence be "clearly exculpatory," *United States v. Kehoe*, 310 F.3d 579, 591 (8th Cir. 2002), *cert. denied*, 538 U.S. 1048 (2003), and that the defendant make "a 'substantial evidentiary showing' that the government intended to distort the judicial fact-finding process," *United States v. Washington*, 318 F.3d 845, 855 (8th Cir.), *cert. denied*, 540 U.S. 899 (2003) (citations omitted). The First Circuit, in rejecting *Smith*, has adopted the Second Circuit view, specifically citing the need for a showing of intentional misconduct, including witness intimidation by threats of prosecution or, again, the deliberate distortion of the fact-finding process. *See United States v. Mackey*, 117 F.3d 24 (1st Cir. 1997); *United States v. Anguilo*, 897 F.2d at 1169. And the Tenth and Eleventh Circuits, while rejecting *Smith* and adopting the prosecutorial misconduct view, have simply not had occasion to spell out a more detailed version of the test. *See United States v. Serrano*, 406 F.3d 1208 (10th Cir.), *cert. denied*, 546 U.S. 913 (2005); *United States v. Chalan*, 812 F.2d 1302 (10th Cir. 1987); *United States v. DiBernardo*, 880 F.2d 1216 (11th Cir. 1989); *United States v. Gottesman*, 724 F.2d 1517 (11th Cir. 1984). Thus, petitioner has failed to establish that decisions of the circuit courts are in any meaningful way inconsistent with one another.

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and that "the proffered evidence would be material, exculpatory, and unavailable from all other sources"); *Williams v. Woodford*, 384 F.3d 567, 600 (9th Cir. 2004) (requiring showing that prosecution refused to grant immunity with deliberate intention of distorting fact-finding process and demonstration of relevance of witness's testimony), *cert. denied sub nom. Williams v. Brown*, 546 U.S. 934 (2005).

In addition, the New York Courts have expressed views consistent with these decisions. New York cases have required a grant of immunity upon a showing of prosecutorial abuse, such as when the prosecutor has built his case on immunized testimony but denied the same to the defendant or affirmatively threatened the witness in question with prosecution. *United States v. Dolah*, 245 F.3d 98 (2d Cir. 2001); *United States v. Bahadar*, 954 F.2d 821 (2d Cir.), *cert. denied*, 506 U.S. 850 (1992). And, like the federal courts, the state courts have also emphasized the importance of a showing that the proffered testimony is exculpatory and vital to the defense. *People v. Owen*, 63 N.Y.2d 824 (1984); *People v. Shapiro*, 50 N.Y.2d 747 (1980). These cases, then, fail to demonstrate any federal/state conflict warranting review here.

Furthermore, the two dissenting opinions from denials of certiorari upon which petitioner so heavily relies do little to suggest that certiorari should be granted here. Both those dissents raise only the issue of the inherent authority of a court to grant immunity, an issue not presented by this case. *See Hunter v. California*, 498 U.S. 887 (1990) (discussing need to review question of "judicial immunity"); *Autry v. McKaskle*, 465 U.S. 1085, 1087 n.3 (1984) ("Petitioner contends that the trial court committed constitutional error when it refused to grant use immunity to [defense witness]"). Moreover, both view that issue from the perspective of the outdated legal landscape existing more than eighteen years ago, when the *Smith* decision could still have been seen as having some vitality. Finally, the views in these dissents quite obviously failed to command a majority of the Court,

and this Court's more recent denials of certiorari on this issue failed to raise any disagreement whatsoever on the worthiness of this contention for review in this Court. *See, e.g., Ebbers v. United States*, 127 S.Ct. 1483 (2007); *Ko v. New York*, 546 U.S. 1093 (2006). Because petitioner has presented no new or better reason for this Court to grant review than was previously available, this Court should deny certiorari in this case.

C. Under the Facts Present Here, the Outcome Would be the Same Regardless of the Theory Espoused.

Under the facts of this case, the trial court's refusal to force the prosecution to grant immunity would be upheld under either the prosecutorial-misconduct theory or the Third Circuit's effective-defense theory as articulated in *Smith*. As a result, this case presents a poor vehicle for resolution of the supposed conflict.

Initially, there is no question that the prosecution's conduct here passes muster under the "prosecutorial misconduct" test. At no point did the prosecution engage in the type of overreaching conduct cited by the courts espousing this theory. The prosecution in no way threatened Anu Singh, the witness petitioner attempted to call; indeed, there is no indication that the prosecutor so much as spoke to the witness at any time. Moreover, at the time the police spoke to the witness, he was fully cooperative, and the record reflects that Anu's later refusal to testify was the result of his consultation with his employer's

attorney in Georgia, long before he arrived in New York. Morever, it was defense counsel who secured a New York attorney for the witness, who also advised him to invoke the Fifth Amendment. Thus, the prosecution was in no way responsible for the witness's invocation of the privilege.

Similarly, the prosecution did not build its case with immunized testimony and then refuse to immunize defense witnesses. The prosecution's case did not include the testimony of any accomplice, but, rather, rested on the eyewitness testimony of the surviving victim and other witnesses who happened to be at the scene. Nor is there any indication that the prosecution deliberately sought to distort the fact-finding process in any way. Accordingly, no basis exists for finding that the prosecutor engaged in abuses sufficient to fall within the showing required by the prosecutorial misconduct test.

The facts here would also not support reversal under the effective defense theory articulated in *Smith*. In *Smith* itself, the Third Circuit recognized that a court's inherent authority to confer immunity must be "bounded by special safeguards" and "made subject to special conditions." 615 F.3d at 971-72. Thus, the court stated that the defense must make a "convincing showing" that the defense witness is available to testify; the proffered testimony is "clearly exculpatory," the testimony is "essential" to the defense, and there is no strong governmental interest in denying immunity. *Id.* at 972. Under these standards, "[i]mmunity will be denied if the proffered testimony is found to be ambiguous, not clearly exculpatory, cumulative or if it

is found to relate only to the credibility of the government's witnesses." *Id.* Similarly, immunity will be denied if the testimony is likely to be severely impeached. *United States v. Perez*, 280 F.3d 318, 348 (3d Cir. 2002), *cert. denied*, 537 U.S. 859 (2002). Additionally, a "potential prosecution of the prospective witness is a sufficient governmental interest to countervail a grant of judicial immunity." *See United States v. Cohen*, 171 F.3d 796, 802 (3d Cir. 1999) (upholding denial of judicial immunity where witness "under investigation"); *United States v. Lowell*, 649 F.2d at 965 (upholding denial of judicial immunity and noting prosecution's "arguable reason" for denying immunity based on possibility of future prosecution).

This case fails to satisfy these standards on several grounds. First, the proffered testimony lacked clarity and was ambiguous at best. Indeed, Anu's statement, as read to the trial court, was barely intelligible in many respects – consistently interrupted by wholly unintelligible words and phrases. The statement also contains no reference to times. At best, it suggests that at some point while he was in the car on the evening of the shooting, Anu saw two individuals other than petitioner pull out guns, but the witness fails to indicate that the weapons were fired at that time. Perhaps more importantly, Anu made other inconsistent statements as well, including one which, according to petitioner, indicated that Anu was not in the SUV at the time of the shooting. *See* Petition at 6. Thus, at the time the proffer was made, it was not at all clear what the substance of the witness's testimony would be.

Second, the witness was subject to substantial impeachment. The witness's differing versions of events would provide fertile ground for impeachment by the prosecution, as would the witness's close friendship with petitioner and joint membership in the group that was a rival to the victims'.

Third, the state had a more than adequate interest in denying immunity. As the prosecutor told the jury in her opening statement, evidence in the case suggested that there might have been more than one shooter. Ballistic evidence recovered at the scene included different caliber bullets, one of the statements offered by the defense also indicated that there were multiple shooters, and Anu's statement suggested that more than one person in the car possessed weapons. In addition, several of the statements, including Jassa's, indicated that Anu was one of the shooters. Jassa claimed to have seen Anu and another firing, and two other statements also indicated that Anu had fired a weapon from the car. Indeed, petitioner steadfastly maintained at trial that Anu was in fact a shooter, although he argued that Anu was the only one who fired. Thus, there existed substantial evidence of Anu's direct involvement in the fatal shooting, a circumstance that would legitimately prompt any prosecutor to deny immunity.

Furthermore, contrary to petitioner's contention (Petition at 36), no evidence excluded the possibility that Anu was a shooter. The vehicle from which the shots were fired had tinted windows, which could easily have obscured a second shooter. This is particularly true if, as Jassa suggested, one of the

shooters reached across another shooter to fire his weapon. Moreover, because the two victims, who were shot in the back, turned and ran as gunfire erupted, they may well have failed to observe the second shooter, particularly if the second assailant began firing after the first. In addition, because the shots were fired from inside the SUV, discharged shell casings from an additional weapon would not necessarily be found on the street, although at least one different-caliber bullet was found near the scene. Nor did the fact that the fatal bullet and the .45 caliber shell casings matched preclude a second shooter. Indeed, this fact established only that the shooter who fired the .45 caliber weapon had managed to hit his target, not that no one else could have fired a weapon in the direction of the victims.

Furthermore, under New York law, the prosecution would have been required to grant the witness transactional immunity, and not just use immunity. As the New York Court of Appeals has noted in considering whether prosecutors have abused their discretion in denying immunity to defense witnesses, while the constitution requires only use immunity to overcome the assertion of the Fifth Amendment privilege, "[o]ur immunity statutes (CPL 190.40, 50.20) . . . grant full transactional immunity for any topic discussed by the witness within the scope of the proceeding (*see, Matter of Brockway v Monroe*, 59 NY2d 179, 189; *People v Perri*, 53 NY2d 957, *affg* 72 AD2d 106; *People v McFarlan*, 42 NY2d 896, *revg* 52 AD2d 112, *on opn* at 89 Misc 2d 905), and prosecutors are, therefore, understandably reluctant to request that such immunity be conferred." *People v. Chin*, 67

N.Y.2d at 33 n. 4. Thus, here, the prosecution would have had to have conferred full transactional immunity on Anu, foregoing any future prosecution of him regardless of evidence that might later become available. Under these circumstances, the district attorney's office was "understandably reluctant" to forego ever bringing Anu, a likely participant in the shootings, to justice.[6]

Moreover, contrary to petitioner's contention, the fact that the prosecution had declined to charge Anu prior to petitioner's trial based on the evidence that was then available does not suggest that the prosecution had no interest in ever prosecuting Anu. At the time of trial, the only admissible evidence against Anu was his own garbled statement. That statement at most suggested that Anu was in the car at the time of the shooting, and this alone would not provide a legally sufficient case against him. *People v. Sanchez*, 61 N.Y.2d 102 (1984). The other statements implicating Anu were made by individuals who were then outside the United States. Jassa, for example, who provided the most damning evidence against Anu, was an Indian national then residing in India. And Vicki, who provided another statement suggesting that Anu had fired a weapon, also resided outside the United States. Thus, the prosecution had far too thin

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[6]Petitioner never argued in state court that the court or the prosecutor had the authority to confer use immunity. His non-specific request for immunity in state court would necessarily be taken as one for transactional immunity, since this was and is the only type of immunity allowed in a New York criminal proceeding.

a basis on which to charge Anu for the murder and attempted murder at the time of petitioner's trial.

This, however, in no way precluded the district attorney's office from pursuing a prosecution later, should sufficient evidence subsequently become available. For example, if the witnesses who made the inculpatory statements were to return to the United States, or if Anu made an unguarded admission to a civilian, the prosecution could legitimately charge Anu later on. Indeed, because no statute of limitations exists in New York for murder charges, *see* N.Y.C.P.L. § 30.10 (1)(a), many state murder cases are brought long after the crime occurs, as new evidence is developed. *See, e.g., People v. Vernace*, 96 N.Y.2d 886 (2001) (upholding indictment in sixteen-year-old murder case by same prosecutor's office as here, based on evidence developed by NYPD "Cold Case Homicide Squad"); *People v. Jones*, 267 A.D.2d 250 (2d Dept. 1999) (seven-year delay); *People v. Hayes*, 39 A.D.3d 1173 (4th Dept. 2007) (sixteen-year delay). In short, the prosecution's inability to file charges early on simply did not suggest that the prosecution could have no legitimate interest in ever bringing charges against the witness. *People v. Adams*, 53 N.Y. 2d 241, 247 (1981) ("Neither, in our view, can the prosecutor be said to have acted in bad faith whenever he refuses to grant absolution to a participant in the crime who has thus far eluded prosecution").

Still further, had the witness been granted immunity, he could readily have colluded with petitioner, his friend and the victims' adversary, to falsely exonerate petitioner. Anu could have claimed

that he alone was responsible for the shootings and that petitioner took no part, and, despite these admissions, could still have avoided any prosecution on murder or attempted murder charges. Moreover, any prosecution of Anu for perjury would be fraught with problems, as the state had only Anu's incoherent prior unsworn statement to establish he was lying. Given these circumstances, it would, again, be reasonable for any prosecutor to be concerned about the prospect of such collusion.

Thus, the prosecution had ample grounds on which to deny Anu immunity – a potential, but currently untenable, prosecution of the witness who petitioner maintained had been directly involved in the incident and who had been implicated by other, then unavailable, witnesses. This is precisely the "potential prosecution of the prospective witness" that even the Third Circuit has deemed "a sufficient governmental interest to countervail a grant of judicial immunity." *United States v. Cohen*, 171 F.3d at 802. Added to this was a very realistic prospect of collusion, about which the prosecution could have done virtually nothing. Because the government had such a strong interest in denying immunity, the trial court would not have been required to grant judicial immunity, even under the Third Circuit's outdated "effective defense" theory. *Id.*

Thus, the facts of this case would produce the same result under either the prosecutorial misconduct or effective defense theories. The case then, is ill-suited to resolve the purported conflict between the circuits, if indeed one were deemed to exist.

CONCLUSION

Contrary to petitioner's contention, the issue presented by this appeal is not the subject of any active conflict among the circuit courts. The disagreement cited by petitioner pertains to an issue not presented by this case, because petitioner did not properly raise it in the state courts. And even on that issue, the split of authority is illusory at best, as the only case to adopt an adverse position to the majority has since limited its own decision to its specific facts. In the absence of a genuine conflict, petitioner has presented no sound reason for this Court to grant review. Accordingly, the petition for certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

TEJPAL SINGH,

Petitioner,

v.

THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

REPLY BRIEF

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Preliminary Statement

Petitioner Tejpal Singh respectfully submits this brief in reply to the Brief for Respondent ("Brief") which was submitted in opposition to his petition for a writ of certiorari to review the judgment of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department. To the extent that not all of Respondent's contentions are addressed herein, Petitioner submits that his principal petition adequately anticipated, and appropriately discussed, such remaining issues.

A. Respondent Incorrectly Argues That Petitioner Has "Conflated" Two Distinct Issues

Respondent contends that, below, Petitioner only challenged the prosecutor's denial of immunity and did not invoke the trial judge's inherent power to compel a grant. Thus, according to Respondent, because "Petitioner did not argue [before the Appellate Division and the New York Court of Appeals] that the trial court had the inherent authority to immunize the witness, independent of the prosecutor's decision[,]" Brief at 6, "petitioner conflates two separate issues, only one of which was properly raised in state court, and thus only one of which would be reviewable here." *Id.*, at 7.

As an obvious effort to manufacture a procedural bar to Supreme Court review, this contention incorrectly bifurcates one question into two. At trial, counsel initially requested that the prosecutor, who had refused to authorize the arrest of Amaprit Anu Singh, grant him immunity upon Anu's invocation of the Fifth

Amendment. Then, in the face of the prosecutor's refusal, counsel unsuccessfully moved the judge for a mistrial to *force the issue*.

There can be no question but that by so moving, Petitioner was invoking the inherent power of the court to remedy the prejudice created by the prosecutor's refusal to grant immunity. Surely, had the court complied, the prosecution would have had no choice but to succumb, at pains, ultimately, of forfeiting its case against Petitioner. *Cf. Roviaro v. United States*, 353 U.S. 53 (1957). Respondent's contention would render that follow-up application meaningless — a view wholly at odds with New York procedural jurisprudence. *People v. Smith*, 97 N.Y.2d 324, 740 N.Y.S.2d 279 (2002).

Having been thereafter unsuccessful in the Appellate Division on this point, Petitioner ultimately asked the Court of Appeals to grant a discretionary appeal. In the course of his application to New York's highest court, Petitioner traced that court's limited precedents, several of which dealt, not only with the issue of a prosecutor's refusal, but with the trial judge's authority, *vel non*, to compel a grant of immunity in order to vindicate a defendant's due process rights.

On this record, therefore, for all the reasons earlier stated, the question of both prosecutorial discretion *and* judicial authority are necessarily before this Court. Accordingly, as indicated in the principal petition, at p. 9, aside from the conflicts among the various circuits, this case presents "an important question of federal law that has not been, but should be, settled by this Court." Supreme Court Rule 10(c). As Justice Marshall earlier

urged in *Autrey v. McKaskle*, 465 U.S. 1085, 1086 (Marshall, J., dissenting) "the proper standards for testing such claims" need to be addressed. *See also Hunter v. California*, 498 U.S. 887 (1990) (Marshall, J., dissenting).

Otherwise stated, the Court should grant this petition to finally explain the ramifications of its earlier statements in *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987) and *Taylor v. Illinois*, 484 U.S. 400, 408 (1988) that "[o]ur cases establish, at a minimum, that criminal Petitioners have the right to *the government's assistance in compelling the attendance of favorable witnesses at trial* and the right to put before a jury evidence that might influence the determination of guilt." Emphasis added. Query: does such "assistance" necessarily entail immunity grants, absent proper reasons not to do so?

B. There Was a Clear Abuse of Both Prosecutorial and Judicial Discretion

Contrary to Respondent's claim, the record presents an unambiguous opportunity for the Court to measure clear prosecutorial abuse. As explained in Petitioner's statement of the case, there was simply no cognizable evidentiary showing that there had been more than one shooter at the time of the incident. Rather, the testimonial and forensic proof demonstrated the presence of only one weapon firing .45 caliber casings at the scene — the same caliber bullet extracted from the deceased. The .38 caliber bullet found *inside* the residence next to the bloody shirt could *not* have been fired at the same time, since there was no one in the

residence at the time of the incident who could have accounted for the blood-stained shirt. Indeed, obviously confronted with this reality, the prosecution made no effort to connect the blood to anyone.

For this reason, this Court would certainly have a basis to determine on plenary review that the prosecutor acted improperly and arbitrarily in declining to grant immunity to Anu and that the judge improperly denied a mistrial. It simply cannot be ignored, as Respondent seeks to do, that this was the same prosecutor who had rejected former Detective Carroll's request to arrest and charge Anu, where, in turn, Anu was placed in the drive-by car by his own statements, thereby making him a knowing accomplice under New York law.[1] Indeed, Respondent also ignores that this was the same prosecutor who threatened the retired Detective Carroll with arrest were he to appear as a defense witness and thereby testify to what Anu had earlier stated to him.[2]

As Respondent itself notes, "all of the circuit courts that have been squarely confronted with the issue have articulated the same fundamental requirements for

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1. *See* New York Penal Law §§20.00 and 20.15. Surely, his statements "arguably revealed [Anu's] knowledge of and involvement in [the group's] plan as well as their collective objective." *People. v. Cabey*, 85 N.Y.2d 417, 421, 626 N.Y.S.2d 20 (1995) citing *People v. Whatley*, 69 N.Y.2d 784, 513 N.Y.S.2d 110 (1987).

2. Given that, absent his proposed testimony, there was no threat of arrest that would have been made against Carroll, this is precisely the type of unconstitutional heavy-handedness that was roundly condemned in *Webb v. Texas*, 409 U.S. 95 (1972).

compelling a prosecutor to grant immunity: a substantial showing of prosecutorial overreaching, often phrased in terms of a deliberate attempt to distort the fact-finding process *or to intimidate a witness*, and a showing of the defendant's need, usually including the clear exculpatory value of the testimony and the inability to obtain the testimony elsewhere." Brief at 16; emphasis added. Surely, this standard has been met on this record where the prosecutor, in the face of Anu's Fifth Amendment invocation, sought to intimidate the one witness who could have demonstrated Anu's own complicity, and where Anu would have unequivocally exculpated Petitioner by placing him outside of the vehicle.

C. New York Law Does Not Preclude the Granting of Limited Use Immunity

Finally, Respondent urges that the prosecutor could not have been expected to give transactional immunity to Anu, given legitimate concerns over Anu's own culpability. It is claimed that "Petitioner never argued in state court that the court or the prosecutor had the authority to confer use immunity." Brief at 24, n. 6. Petitioner first notes that Respondent is absolutely wrong: *The record will attest that Petitioner specifically asked the Court of Appeals to consider the use immunity issue in furtherance of avoiding any legitimate prosecutorial concerns regarding granting transactional immunity for Anu.*

In any event, even if — contrary to the record, as above discussed — there had existed a legitimate prosecutorial concern about maintaining the ability to

charge Anu, New York Criminal Procedure Law §50.10(1) — as Petitioner urged before the state courts — does not preclude the granting of use immunity. *See Cortes v. County of Nassau*, 248 A.D.2d 616, 617, 670 N.Y.S.2d 509 [2nd Dept. 1998]); *People v. Osorio*, 86 A.D.2d 233, 449 N.Y.S.2d 968 (1st Dept.1982), *appeal dismissed*, 57 N.Y.2d 671, 454 N.Y.S.2d 77 (1982). This is especially so, here, where Anu specifically invoked the *Fifth Amendment*, with its implication of use immunity, rather than asserting a right to remain silent instead of securing statutory transactional immunity. Because the former is all the Constitution demands, *New Jersey v. Portash*, 440 U.S. 450, 457-58 (1979); *Kastigar v. United States*, 406 U.S. 441 (1972), contrary to Respondent's argument, that is all the prosecutor would have been required to bestow.

Conclusion

The Petition for a Writ of Certiorari Should Be Granted

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